



Clearer Rules When Revealing Dangers to Public Safety: Reflections on the Chambers Saga

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Federal Law enforcement officers are sometimes placed in a very complicated position when they discover potential wrongdoing within their agencies. In making a disclosure of alleged wrongdoing by fellow officers or superiors, law enforcement officers must delicately balance a number of competing factors including the potential risk to the public presented by the supposed wrongdoing, the need for consistency and unity within the police force or government agency and the means by which the disclosure would be made, often against the wishes or instruction of one's chain of command. The United States Court of Appeals for the Federal Circuit, in Chambers v. Department of the Interior, 515 F.3d 1362 (Fed. Cir. 2008) appears to have clarified the legal standard for what constitutes a disclosure of "a substantial and specific danger to public health or safety." 5 U.S.C. §2302(b)(8)(A).

What is the Established Legal Standard?

The Whistleblower Protection Act ("WPA"), the heart of which is codified at 5 U.S.C. §2302, provides that to receive protection by the WPA an employee must disclose wrongdoing that he or she reasonably believes is either 1) a violation of a law, rule or regulation; or 2) an abuse of authority, gross waste of funds, gross mismanagement or a substantial and specific threat to public health or safety. Once an employee has made a protected disclosure, the employee must also show that the disclosure was a contributing factor in the decision to impose the personnel action taken. The burden then shifts to the agency to provide clear and convincing evidence that it would have taken the action in the absence of the disclosure.

The Chambers Case

In 2003, Theresa Chambers was Chief of the U.S. Park Police. She believed that the Department's plan to redeploy Park Police officers away from their previous duties including drug investigations on national park property and the surrounding areas, as well as traffic enforcement to improve security at the monuments and memorials on the national mall was placing an undue burden on the Park Police force. She felt the new requirements severely stretched her force and caused an increase in drug activity on park lands and traffic accidents on roads such as the Baltimore Washington Parkway.

In communications with a Congressional staffer and a Washington Post reporter, Chief Chambers articulated her concerns in opposition to Department of Interior senior officials. Her comments, including references to police staffing at national monuments and on other park property were included in a Washington Post article on the issue. Further, Ms. Chambers, in her communication with a Congressional staffer discussed Department of Interior budget requests for the Park Police department because Chambers felt the Park Police needed additional funds to hire more officers and to cover overtime expenses. Following her disclosures, Ms. Chambers was removed from her position based on a series of related charges including 1) Making Public Remarks Regarding Security in Public Areas; 2) Improperly Disclosing Budget Deliberations; 3)

Failing to Carry Out a Supervisor's Instructions, and 4) Failing to Follow the Chain of Command.

The Merit Systems Protection Board Decision: A Blend of Standards that Raised the Bar for Whistleblowers

The Merit Systems Protection Board ("MSPB"), in upholding Chief Chambers' removal, held that her disclosures were not protected under the WPA and determined that the Chambers case presented "a classic policy disagreement." Chambers v. Department of the Interior, 103 M.S.P.R. 375, 387, 389-91 (2006). In finding that the facts revealed a policy disagreement, the Board said that for a policy disagreement to serve as the basis of a protected disclosure, Ms. Chambers must show that the "legitimacy of [the] particular policy choice is not debatable among reasonable people." Though this standard had been articulated in previous decisions to evaluate a claim of "gross mismanagement," the Board found that the analysis was "equally applicable to claims of a disclosure of a substantial and specific danger to public safety."

In particular, the Board held that Ms. Chambers' statement that the agency's decision to shift Park Police resources to providing security at the monuments and memorials on the national mall presented a risk to public safety was not protected because "while some may disagree with that policy choice, a reasonable person could not conclude that policymakers have no right to make the choice in the first place." This was coupled with the Board's determination that Chambers' disclosures were neither specific nor substantial enough to warrant protection. Thus, in evaluating Ms. Chambers' disclosures, the Board applied two standards. First, the Board inquired whether Ms. Chambers' disclosures evidenced a reasonable belief that the agency's staffing decision constituted a substantial and specific danger to public safety. Then, the Board applied the "gross mismanagement" standard that the policy choice not be "debatable among reasonable people." The Board determined that Ms. Chambers' disclosures did not meet either standard. The Board further held that the agency had articulated clear and convincing evidence that it would have removed Ms. Chambers absent her disclosures.

The Federal Circuit Decision: Providing Clarity to the Blurred Lines Between "Gross Mismanagement" and "Danger to Public Safety"

The Federal Circuit, while upholding the Board's determination that misconduct occurred and the penalty of removal, reversed the Board's decision that Chief Chambers' statements were not a protected disclosure of a substantial and specific threat to public health or safety. Chambers v. Department of the Interior, 515 F.3d 1362, (Fed. Cir. 2008) The Court held that the MSPB had incorrectly applied the "gross mismanagement" standard regarding a policy disagreement to an alleged disclosure of a danger to public safety. The Court further held that the Board had "conflated" the standards for disclosures of gross mismanagement and threats to public health or safety, placing an unduly high burden of proof on Ms. Chambers. The Court refused to disturb the evidentiary rulings and credibility determinations of the Board and affirmed the Board's decisions to sustain the charges of misconduct and the penalty of removal.

Rather than decide on its own that Ms. Chambers' disclosure was protected by the WPA, the Federal Circuit remanded the matter back to the Board for a determination as to whether Ms. Chambers' disclosure met the correct standard for protection.

The Court also found that although "under certain circumstances [disclosures of dangers to public health or safety and those of gross mismanagement] might overlap in the context of law enforcement, [that] does not change the fact that the statute creates two distinct standards. In other words, Congress did not intend...to categorically classify any danger arising from law enforcement solely as a policy issue, to which the standard for gross mismanagement would apply." Thus, while law enforcement officials can be faced with complicated decisions that may blur the lines between safety concerns and policy debates, the Whistleblower Protection Act delineates distinct burdens of proof to establish what disclosures are protected. Law enforcement officials must not, however, assume that simply because the focus of their duties is public safety that every disclosure will be protected. In order to receive protection from the WPA, the danger to public safety disclosed must be both *substantial AND specific*.

What is "Substantial and Specific"?

For example, the MSPB has found that a "revelation of a negligible, remote or ill-defined peril that does not involve any particular person, place or thing is not protected." Further, the threat cannot be one that is merely speculative, it must be a tangible threat. The Federal Circuit has held that "the disclosure of a danger only potentially arising in the future is not a protected disclosure." Chambers, 515 F.3d at 1369. Other important factors used by the courts in evaluating a disclosure of a danger to public safety include the likelihood of harm resulting from the danger, and the immediacy of the danger. Id. To illustrate this, the MSPB has found that disclosure of an agency instruction to security guards not to fully load their weapons only resulted in speculation that harm may occur in the future and as a result, was not protected. Mogyorossy v. Dept. of Air Force, 96 M.S.P.R. 652, 661-62 (2004). Meanwhile, an employee's disclosure that co-workers were coughing up blood as a result of improper sandblasting procedures was found to be a disclosure of a substantial and specific danger. Wojcicki v. Dept. of Air Force, 72 M.S.P.R. 628, 634-35 (1996). Law enforcement officials need not have absolute proof that such a danger exists but a *reasonable belief* that it does. Chambers, 515 F.3d at 1367.

Protected Disclosures Are Not a Shield for Misconduct

Despite the increased clarity in the definition of a protected disclosure of a substantial and specific danger to public health or safety provided by the Chambers decision, law enforcement officials must be mindful that a disciplinary action will still be sustained if the agency can show by clear and convincing evidence that it would have taken the action in question in the absence of the protected disclosures. Simply making a protected disclosure does not end the inquiry into the legitimacy of a disciplinary action. The legislative history of the WPA makes clear that it should not be construed as "protecting an employee who is otherwise engaged in misconduct...from appropriate disciplinary action." Further, law enforcement officers, in particular, are held to a higher standard of conduct than other federal employees.

In several decisions, the MSPB and the Court of Appeals for the Federal Circuit have sustained disciplinary actions against employees who engaged in unrelated misconduct. Carr v. Social Sec. Admin., 185 F.3d 1318 (Fed. Cir. 1999); Watson v. Department of Justice, 64 F.3d 1524, 1527 n.3 (Fed. Cir.1995); Marano v. Department of Justice, 2 F.3d 1137, 1142 n.5 (Fed. Cir. 1993); See Nagel v. DHHS, 11 MSPR 538, 540-41 (1982), aff'd, Nagel v. DHHS, 707 F.2d 1384 (Fed. Cir. 1983); Acting Special Counsel v. Dept of Army, 4 M.S.P.R. 469, 472 (1980). Law enforcement officers who choose to make protected disclosures must be mindful of the means and methods by which a disclosure is made because the actions underlying the disclosure can often form the basis of disciplinary action. For example, a Border Patrol agent's delay in disclosing wrongdoing, in violation of Agency policy, was a valid basis for removal. Watson, 64 F.3d at 1530. Again, making a disclosure does not grant an employee immunity from disciplinary action. Even if it were proven that her disclosures warranted protection under the WPA, Ms. Chambers' removal was still sustained by the Board and affirmed by the Federal Circuit based on misconduct not directly related to protected disclosures. Ms. Chambers' misconduct included bypassing her chain of command and failing to follow supervisory instructions.

The Chambers decision also raised another important concern for law enforcement officers when evaluating whether to make a disclosure, namely striking a balance between the need to reveal potential wrongdoing versus disclosing sensitive information to would be lawbreakers. In the MSPB's decision upholding Ms. Chambers' removal the Board emphasizes that Ms. Chambers' disclosures were not only evidence of a policy disagreement but revealed sensitive police staffing information to would be wrongdoers. The National Treasury Employees Union, in its amicus brief on behalf of Ms. Chambers, disputes this argument by claiming that the WPA resolves the conflict between disclosing a danger to public safety and providing information to potential criminals in favor of disclosure as the WPA only bans disclosures which are prohibited by law or that are required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs. Chief Chambers also claims that the large majority of information she provided to the Washington Post was already known to the reporter at the time of the disclosure. The Federal Circuit, in upholding the Board's determination as to the findings of misconduct, did not address this issue specifically, but one can imagine the continued struggle that faces the law enforcement community when faced with the decision to reveal what may be potential wrongdoing within their agencies.

Questions Remain Over Whether Chief Chambers' Disclosures Were Protected under the WPA or Constitute Misconduct

Despite the Federal Circuit's decision to uphold the Board's determination as to the charges of misconduct and the penalty of removal against Chief Chambers, questions remain as to whether misconduct in fact occurred. The essence of Chief Chambers' alleged misconduct is what she claims to be a protected disclosure under the WPA.

On January 8, 2009, the Board issued its decision on remand from the Federal Circuit, in which the members could not agree as to whether Chief Chambers' disclosures were protected. Chambers v. Dep't of Interior, 2009 M.S.P.B. 3 (2009). In his concurring opinion, Chairman Neil McPhie found that some of Chief Chambers' disclosures made to the Washington Post and

to a Congressional staff member were disclosures of a substantial and specific danger to public safety. Relying upon prior Board precedent, Chairman McPhie found that disclosures that revealed either “actual past harm or detailed circumstances giving rise to a likelihood of impending harm,” were protected under 5 U.S.C. § 2302(b)(8), but more general, non-specific descriptions of future harm did not rise to the level of a substantial and specific danger to public safety. *Id.* at 6, ¶7. For example, Chairman McPhie found that Chief Chambers’ disclosure that “traffic accidents have increased on the Baltimore-Washington Parkway, which now often has two officers on patrol instead of the recommended four,” and that “in neighborhood areas...residents are complaining that homeless people and drug dealers are again taking over smaller parks,” were protected disclosures because they describe “specific consequences that she alleged had already resulted from the diversion of Park Police patrol officers from the BW parkway and the smaller national parks.” *Id.* at 7, 8 ¶¶9, 10. The consequences, Chairman McPhie found, are “objectively significant and serious dangers to public health and safety.” *Id.* at 7, ¶9.

On the other hand, Chairman McPhie determined that absent a “specific example illustrating a substantial specific public health or safety consequence,” or a manifestation of the concern for harm, Chief Chambers’ statement that officers were being required to remain on duty for 12-hour shifts without bathroom breaks, would not be protected. *Id.* at 8, ¶11. Further, conclusory allegations, such as expressions of fear that “harm or death com[ing] to a visitor at one of the parks or that we’re going to miss a key thing at one of our icons,” standing alone are unprotected without more specific allegations that would evidence a reasonable basis for Chief Chambers’ stated fears. *Id.*

Despite finding that some of Chief Chambers’ statements were protected, Chairman McPhie determined that Chief Chambers’ non-protected statements were sufficient to sustain the charge of “making public statements regarding security on the Federal Mall, and in parks and on the parkways of the Washington, DC metropolitan area.” *Id.* at 11, 12. Not only did Chairman McPhie find that there was sufficient evidence to sustain this charge, but that Chief Chambers’ protected statements were unrelated to the other three charges previously sustained by both the Board and the Federal Circuit. Chairman McPhie relied on the fact that Chief Chambers’ immediate supervisor testified that the information containing security staffing at monuments was from a document labeled “law enforcement sensitive,” “a designation that the information should not be released to the public. *Id.* at 13, ¶28. Also, Chairman McPhie cited the Agency’s instruction to Chief Chambers not to “reference the President’s [2005] budget under any circumstances,” as additional evidence to support his conclusion that the Agency would have taken the removal action in the absence of her protected disclosures. *Id.* at 15, ¶35.

Chairman McPhie’s analysis provides some additional clarity in determining whether an employee’s disclosure rises to the level of a substantial and specific danger to public health or safety. However, it appears likely that the debate over the contours of this determination will continue both at the MSPB and at the Federal Circuit.

While the court battles in the Chambers case are also likely to continue, the legal dilemmas and potentially contradictory outcomes created by the Chambers case are at the heart of efforts to reform the Whistleblower Protection Act discussed below.

Legislation on the Horizon

Both houses of Congress undertook efforts to reform the Whistleblower Protection Act during the 110th Congress (S.274, H.R. 985). Each chamber passed its own piece of legislation and a conference committee was convened in order to iron out the differences between the two bills, but did not agree on a final version. The Senate version has been re-introduced in the 111th Congress (S. 372) and the House approved of inserting its version of the whistleblower language in H.R. 1, the economic stimulus bill. The whistleblower language was stripped from the stimulus bill during the conference committee and it is likely that the Senate bill will move forward through the full legislative process.

Despite the differences between the House and Senate version, there is an important similarity that strikes at the heart of the conflict addressed by the Chambers decision. Both bills revise the definition of a disclosure to exclude:

a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences:

- (i) any violation of any law, rule or regulation; or
- (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety.

As drafted, the whistleblower reform legislation would exclude policy decisions that are disclosures about “substantial and specific danger to public health and safety.” The Federal Circuit in Chambers specifically did not permit such policy disagreement disclosures to be excluded from the definition of a “disclosure.” Thus, any new legislation would overrule the basic holding in Chambers.

Further, the legislation would define a reasonable belief that a disclosure evidences a violation of law rule or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority; or, a substantial and specific danger to public health or safety by determining:

whether a disinterested observer with knowledge of the essential facts known or readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste abuse or danger.

By creating a reasonable person standard for determining whether an employee or applicant has a reasonable belief that he or she has made a protected disclosure, both pieces of legislation would provide some much needed guidance on what constitutes “reasonable belief.”

Thus, based on the apparent direction of legislative reform of the WPA, the Chambers decision may become a relic of an obsolete framework for evaluating whether disclosures are protected or whether the disclosures and the employee’s underlying conduct can rise to the level of actionable misconduct.